Bank Utama (M) Bhd v Perkapalan Dai Zhun Sdn Bhd

HIGH COURT (KUALA LUMPUR) — SUIT NO D1-22-1593 OF 2001
VINCENT NG J
16 OCTOBER 2002

Civil Procedure *— Jurisdiction — Courts of co-ordinate jurisdiction — Cause of action arose in Kuching — Plaintiff's registered office and head office located in Kuching — Defendant's had place of business in Kuching and registered office in Kuala Lumpur — Whether High Court of Sabah and Sarawak at Kuching had jurisdiction — Courts of Judicature Act 1964 s 23(1)*

Civil Procedure *— Jurisdiction — Forum conveniens — Documents addressed to plaintiff's Kuching branch and defendant's place of business in Kuching — Material witnesses for the trial resided in Kuching — Matter to be heard by court which was more accessible and appropriate in the interest of all parties — Whether High Court of Sabah and Sarawak at Kuching was the forum conveniens and the most appropriate court to determine matter*

Words and Phrases *— 'Resides or, has his place of business' — Courts of Judicature Act 1964 s 23(1)(b) — Meaning of*

CSH had commenced an admiralty action against the defendant at the Johor Bahru High Court ('the Johor Bahru proceedings') in 1996. To avoid threatened arrest of its vessels, the defendant obtained a bank guarantee facility from the plaintiff's Kuching branch. Pursuant to the said bank guarantee facility, the plaintiff issued a bank guarantee to CSH ('the first bank guarantee'). The first bank guarantee expired without any demand made thereunder by CSH and the same was subsequently cancelled by the plaintiff. Thereafter, the plaintiff granted to the defendant's directors ('Aw' and 'Chung') a new bank guarantee facility. New bank guarantees/letters of undertaking ('the said bank guarantee') were issued by the plaintiff in favour of CSH pursuant to the new bank guarantee facility. CSH made a demand under the said bank guarantee. The plaintiff then debited a sum of money from the defendant's current account maintained with the plaintiff's Kuching branch for commission due on the said bank guarantee. The plaintiff filed a writ of summons and statement of claim in this court to claim an indemnity against the defendant in respect of the sums paid out by the plaintiff to CSH under the said bank guarantee. The defendant's applied (in encl 6) to set aside the writ and the proceedings herein pursuant to O 12 r 7 and/or O 92 r 4 of the Rules of the High Court 1980 and/or the inherent jurisdiction of the court. The defendant's application was allowed by the learned senior assistant registrar ('the SAR'). This was the plaintiff's appeal against the decision of the SAR. In resisting encl 6, the plaintiff contended that s 23(1)(b) of the Courts of Judicature Act 1964 ('the Act') should be read disjunctively to confer jurisdiction to High Court

A Malaya in Kuala Lumpur, on the sole basis that the defendant's registered office was now in Kuala Lumpur.

Held, dismissing the plaintiff's appeal:

(1) The factors determining the territorial jurisdiction of the High B Court for civil matters were laid down in s 23(1) of the Act. It did not matter whether s 23(1)(b) of the Act was read disjunctively or conjunctively as the phrase 'resides or, has his place of business' should not be taken to mean or to connote 'having a registered office'. If this had been the intention of the legislature, it would have been so expressed. It was the place of business of a company C which was of material consideration on the question of the locus of a cause of action (see pp 46B, 47C).

(2) The doctrine of forum conveniens called for the matter to be heard by a court which was more accessible and appropriate in the interest of all parties and for the ends of justice, notwithstanding D that other courts also had territorial jurisdiction pursuant to s 23(1) of the Act (see p 47H–I).

(3) In the instant case, the High Court of Sabah and Sarawak at Kuching not only had jurisdiction but was the forum conveniens and the most appropriate court to determine this matter on the grounds that: (a) the cause of action arose in Kuching; (b) the E plaintiff's registered office and head office was in Kuching; (c) the bank guarantee facilities were granted and the bank guarantees/ letters of undertaking were issued by the plaintiff branch in Kuching; (c) the defendant's place of business was at all material times in Kuching, although its registered office had moved to F Kuala Lumpur in 1999; (d) all the relevant documents exhibited were addressed to the plaintiff's Kuching branch and/or the defendant's place of business in Kuching; (e) the material witnesses for the trial of this matter must surely reside in Kuching as all transactions between the parties took place in Kuching (see p 48A–D).

G (4) Furthermore, since the defendant had filed an action against the plaintiff in Kuching, it was more appropriate, in order to save costs and time, for the plaintiff to address their claim, if any, as a counterclaim in the Kuching action (see p 48D).

H **[Bahasa Malaysia summary**

CSH telah memulakan satu tindakan undang-undang perkapalan terhadap defendan di Mahkamah Tinggi Johor Bahru ('prosiding Johor Bahru') pada tahun 1996. Untuk mengelak kapal-kapalnya daripada ditahan, defendan memperolehi satu kemudahan jaminan I bank dari cawangan plaintif di Kuching. Menurut kemudahan jaminan bank tersebut, plaintif akan mengeluarkan satu jaminan bank kepada CSH ('jaminan bank yang pertama'). Jaminan bank yang

pertama telah luput tanpa sebarang tuntutan dibuat di bawahnya oleh CSH dan yang sama kemudiannya dibatalkan oleh plaintif. Selepas itu, plaintif memberikan pengarah-pengarah defendan ('Aw' dan 'Chung') satu kemudahan jaminan bank yang baru. Jaminan bank/surat akujanji yang baru ('jaminan bank tersebut') dikeluarkan oleh plaintif memihak kepada CSH menurut kemudahan jaminan bank yang baru. CSH telah membuat satu tuntutan di bawah jaminan bank tersebut. Plaintif kemudiannya mendebitkan sejumlah wang dari akaun semasa defendan di cawangan Kuching plaintif untuk komisyen yang harus dibayar atas jaminan bank tersebut. Plaintif memfailkan satu writ saman dan pernyataan tuntutan dalam mahkamah ini untuk menuntut tanggungan terhadap defendan berkaitan dengan jumlah yang dibayar oleh plaintif kepada CSH di bawah jaminan bank tersebut. Defendan memohon (dalam lampiran 6) untuk mengenepikan writ dan prosiding tersebut menurut A 12 k 7 dan/atau A 92 k 4 Kaedah-Kaedah Mahkamah Tinggi 1980 dan/atau bidang kuasa sedia ada mahkamah. Permohonan defendan dibenarkan oleh penolong kanan pendaftar ('PKP') yang arif. Ini merupakan rayuan plaintif terhadap keputusan PKP. Dalam membantah lampiran 6, plaintif berhujah bahawa s 23(1)(b) Akta Mahkamah Kehakiman ('Akta tersebut') harus dibaca secara penyarak untuk mengurniakan bidang kuasa kepada Mahkamah Tinggi Malaya di Kuala Lumpur, atas alasan bahawa pejabat berdaftar defendan kini berada di Kuala Lumpur.

Diputuskan, menolak rayuan plaintif:

(1) Faktor-faktor yang menentu bidang kuasa wilayah Mahkamah Tinggi untuk perkara sivil dinytakan dalam s 23(1) Akta tersebut. Adalah tidak perlu untuk menentukan sama ada s 23(1)(b) Akta tersebut dibaca secara penyarak atau penghubung kerana ungkapan 'resides or, has his place of business' tidak harus dianggap bermaksud atau menandakan 'having a registered office'. Andainya inilah hasrat badan perundangan, ia pasti dinyatakan demikian. Tempat perniagaan sesebuah syarikat merupakan pertimbangan material atas soalan locus satu kausa tindakan (lihat ms 46B, 47C).

(2) Doktrin forum conveniens menghendaki perkara ini dibicara di mahkamah yang lebih mudah didatangi dan wajar untuk mencapai semua pihak dan demi kepentingan keadilan, tanpa mempedulikan bahawa mahkamah lain juga mempunyai bidang kuasa wilayah menurut s 23(1) Akta tersebut (lihat ms 47H–I).

(3) Dalam kes ini, Mahkamah Tinggi Sabah dan Sarawak di Kuching bukan sahaja mempunyai bidang kuasa tetapi merupakan forum conveniens dan mahkamah yang paling wajar untuk menentukan perkara ini atas alasan bahawa: (a) kausa tindakan timbul di Kuching; (b) pejabat berdaftar dan pejabat utama plaintif adalah di Kuching; (c) kemudahan jaminan bank diberikan dan

jamninan bank/surat akujanji dikeluarkan oleh cawangan plaintif di Kuching; (c) tempat perniagaan defendan pada semua masa material berada di Kuching, walaupun pejabat berdaftar telah berpindah ke Kuala Lumpur pada tahun 1999; (d) semua dokumen relevan yang diekshibitkan dialamatkan kepada cawangan Kuching plaintif dan/atau tempat perniagaan defendan di Kuching; (e) saksi-saksi material untuk perbicaraan perkara ini sudah tentunya menetap di Kuching kerana semua transaksi di antara pihak-pihak berlaku di Kuching (lihat ms 48A–D).

(4) Tambahan pula, oleh kerana defendan telah memfailkan satu tindakan terhadap plaintif di Kuching, adalah lebih wajar, untuk tujuan menjimatkan kos dan masa, sekiranya plaintif mengemukakan tuntutan, jika ada, sebagai satu tuntutan balas dalam tindakan di Kuching (lihat ms 48D).]

Notes

For cases on courts of co-ordinate jurisdiction, see 2 *Mallal's Digest* (4th Ed, 2001 Reissue) para 3675.

For cases on forum conveniens, see 2 *Mallal's Digest* (4th Ed, 2001 Reissue) paras 3715–3720.

Cases referred to

Cita Marine Sdn Bhd v Progressive Insurance Bhd & Ors [2001] 1 MLJ 81 (refd)

Dato' Ho Seng Chuan v Rabobank Ltd [2002] 3 AMR 2606 (refd)

Daya Corp Sdn Bhd v CP Ng & Co Sdn Bhd [1990] 1 MLJ 191 (refd)

Dayasar Corp Sdn Bhd v CP Ng & Co Sdn Bhd [1990] 1 MLJ 191 (refd)

Fung Beng Tiat v Marid Construction Co [1996] 2 MLJ 413 (refd)

Malacca Securities Sdn Bhd v Loke Yu [1999] 6 MLJ 112 (refd)

Bukit Tajam Estates (Sabah) Sdn Bhd, Re [1995] CSLR XX [4647]; 2(2) *Mallal's Digest* (4th Ed, 2001 Reissue) para 3776 (refd)

Syarikat Nip Kui Cheong Timber Contractor v Safety Life and General Insurance Co Sdn Bhd [1975] 2 MLJ 115 (refd)

Sova Sdn Bhd v Kasih Sayang Realty Sdn Bhd [1988] 2 MLJ 268 (refd)

Sykt Nip Kui Cheong Timber Contractor v Safety Life and General Insurance Co Sdn Bhd [1975] 2 MLJ 115 (refd)

Legislation referred to

Courts of Judicature Act 1964 s 23(1)(b)

Rules of the High Court 1980 O 12 r 7, O 92 r 4

Mohan Singh (*KM Chye & Murad*) for the appellant/plaintiff.

Vinayaga R (*Skrine*) for the respondent/defendant.

Vincent Ng J: This is the plaintiff's appeal against the decision of the learned senior assistant registrar ('the SAR'), delivered on 5 April 2002,

allowing the application in encl 6 with costs. Enclosure 6 is the defendant's application pursuant to O 12 r 7 and/or O 92 r 4 of the Rules of the High Court 1980 ('the RHC') 1980 and/or the inherent jurisdiction of the court to set aside the writ and the proceedings herein. A

The plaintiff's writ of summons and statement of claim were filed herein to claim an indemnity against the defendant, in respect of sums allegedly paid out by the plaintiff to one Chiap Seng Hong Trading Pte Ltd, Singapore ('CSH'). The payment was allegedly made pursuant to a Bank Guarantee/Letter of Undertaking No 01136000016 dated 14 April 2000, issued by the plaintiff in favour of CSH. The defendant denies liability to the plaintiff in whole and/or in part. B

The background facts in brief are as follows: C

(a) In 1996, CSH commenced an Admiralty Action in Rem No 27–2–1996 in the Johor Bahru High Court against the defendant ('the JB proceedings').

(b) To avoid threatened arrest of its vessels, the defendant obtained a bank guarantee facility, which was granted by the Kuching branch of the plaintiff, by way of a letter of offer dated 27 February 1996. Pursuant to the said bank guarantee facility, a Bank Guarantee/Letter of Undertaking No 01136960038 dated 15 April 1996, for the sum of RM4,208,869.00, was issued to CSH. D

(c) The Bank Guarantee/Letter of Undertaking No 01136960038 dated 15 April 1996 expired on 14 April 1997 without any call or demand made thereunder by CSH. On 10 April 1997, it was cancelled by the plaintiff. E

(d) Subsequently, the plaintiff granted Aw and Chung (the directors of the defendant at that time) a new bank guarantee facility for the same amount of RM4,208,869 in favour of CSH, by way of a letter of offer dated 6 March 1997. F

(e) Pursuant to the new bank guarantee facility, Aw and Chung had signed a contract of indemnity dated 26 April 1997 in favour of the plaintiff.

(f) The bank guarantee facility granted to Aw and Chung was later amended by the plaintiff from RM4,208,869.00 (as stated in the letter of offer dated 6 March 1997) to USD1,637,692.22 (its equivalent in USD) by way of a letter of offer dated 12 May 1997. G

(g) The bank guarantee/letter of undertaking in favour of CSH for the sum of USD1,637,692.22 issued under the bank guarantee facility granted to Aw and Chung, and its subsequent renewals are as follows: H

(i) Bank Guarantee/Letter of Undertaking No 01136970041 dated 10 April 1997;

(ii) Bank Guarantee/Letter of Undertaking No 01136980034 dated 14 April 1997; I

(iii) Bank Guarantee/Letter of Undertaking No 01136990044 dated 14 April 1999; and

(iv) Bank Guarantee/Letter of Undertaking No 01136000016 dated 14 April 2000.

(h) From the plaintiff's statement of claim, it appears that CSH made a demand on the Bank Guarantee/Letter of Undertaking No 0113600016 dated 14 April 2000, issued by the plaintiff, under the bank guarantee facility granted to Aw and Chung.

(i) Pursuant to the said call, the plaintiff had allegedly made payment to CSH the sum of USD1,267,553.35 and SGD1,965.05.

(j) It was the defendant's contention, that although they had already been discharged and released of all liabilities to the plaintiff with respect to the Bank Guarantee/Letter of Undertaking No 01136960038 dated 15 April 1996, which was the only bank guarantee issued pursuant to the bank guarantee facility granted to the defendant, the plaintiff had wrongfully debited the sum of RM1,238,970.30 (as at 31 August 2000) from the defendant's current account with the plaintiff's Kuching branch for commission due on the various bank guarantees/ letters of undertaking issued pursuant to the bank guarantee facility granted to Aw and Chung.

(k) Consequently, the defendant commenced legal proceedings against the plaintiff, Aw and the executor of the estate of Chung by way of Kuching Suit No 22–101–2001 in the High Court of Sabah and Sarawak at Kuching ('the Kuching action') for, inter alia, the following:

(i) declaration that Aw and Chung are liable to indemnify the plaintiff in respect of the bank guarantees issued pursuant to the bank guarantee facility granted to them and that the defendant is discharged and released of all liabilities to the plaintiff;

(ii) order that the plaintiff refund to the defendant the sum of RM1,238,970.30 or such other sum wrongfully debited against the defendant's current account with the plaintiff, together with interests and costs.

(l) The plaintiff then entered conditional appearance in the Kuching action, coupled with an application to set aside the defendant's writ. On 28 January 2002, the plaintiff's application to set aside the defendant's writ was dismissed with costs by the learned judge.

After having studied the affidavits filed, and perused the written submissions of both counsel, I was of the considered view that the territorial jurisdiction and forum convenience of the plaintiff's cause of action, if any, in the current case is the High Court of Sabah and Sarawak at Kuching, and I dismissed the plaintiff's appeal. The following are my reasons.

In Malaysia, there are two High Courts of co-ordinate jurisdiction and status, that is, the High Court of Malaya and the High Court of Sabah and Sarawak. Each has jurisdiction over disputes that arise within its territory and there are presently no provisions that confer power on one High Court to transfer proceedings to the other (see *Fung Beng Tiat v Marid Construction Co* [1996] 2 MLJ 413 at p 419; *Dayasar Corp Sdn Bhd v CP Ng & Co Sdn*

Bhd [1990] 1 MLJ 191 at p 192; *Syarikat Nip Kui Cheong Timber Contractor v Safety Life and General Insurance Co Sdn Bhd* [1975] 2 MLJ 115 at p 116; *Sova Sdn Bhd v Kasih Sayang Realty Sdn Bhd* [1988] 2 MLJ 268 at pp 270–271; *Cita Marine Sdn Bhd v Progressive Insurance Bhd & Ors* [2001] 1 MLJ 81 at pp 85 – 86; and *Re Bukit Tajam Estates (Sabah) Sdn Bhd; Bank Pertanian Malaysia v Bukit Tajam Estates (Sabah) Sdn Bhd* [1995] CSLR XX[4647], 2(2) *Mallal's Digest (*4th Ed, 2001 Reissue) para 3776.

The factors determining the territorial jurisdiction of the High Court for civil matters are laid down in s 23(1) of the Courts of Judicature Act 1964. This was decided by the court in the case of *Dayasar Corp Sdn Bhd v CP Ng & Co Sdn Bhd* [1990] 1 MLJ 191 at pp 191–192. Subparagraphs (a)–(d) of s 23(1) of the Courts of Judicature Act 1964 must be construed disjunctively and hence if any one of the limbs of s 23(1) of the Courts of Judicature Act 1964 applies, the relevant court shall have jurisdiction (see *Malacca Securities Sdn Bhd v Loke Yu* [1999] 6 MLJ 112 at p 126; *Cita Marine Sdn Bhd v Progressive Insurance Bhd & Ors* [2001] 1 MLJ 81 at pp 86–87; and also my decision in *Dato' Ho Seng Chuan v Rabobank Asia Ltd* [2002] 3 AMR 2606).

Determination of encl 6 does not pose any difficulty as it was not disputed by the plaintiff that not only were all the defendant's transactions with the plaintiff's Kuching branch, which constituted the alleged cause of action of the above suit, but also that the defendant's place of business was located in Kuching. It was also not seriously challenged by the plaintiff that all the facts related to this proceedings occurred in Kuching, save the Admiralty Action in Rem No 27–2–1996 which was commenced against the defendant on 3 July 1996 in Johor Bahru High Court. On the part of the defendant, it was conceded by them that their registered office had moved to Kuala Lumpur sometime in 1999.

The pleadings disclosed that the plaintiff's cause of action was based on a payment to CSH pursuant to a Bank Guarantee/Letter of Undertaking No 01136000016 dated 14 April 2000, which allegedly arose directly from an (earlier) original letter of undertaking dated 15 April 1996 ('the LOU') issued by the plaintiff to CSH, a Singapore registered company, as a security and in consideration of CSH refraining from arresting the defendant's vessel 'Gina II'.

The contention of the plaintiff in resisting the application is two-fold, namely:

(i) that s 23(1)(b) of the Courts of Judicature Act 1064 ('the Act') should be read disjunctively to confer jurisdiction to High Court Malaya in Kuala Lumpur, on the sole basis that the registered office of the defendant company had moved to Kuala Lumpur sometime in 1999; and

(ii) that the defendant cannot be heard saying 'that the High Court of Malaya has no jurisdiction to adjudicate this action commenced in furtherance of the Johor Bahru proceedings'.

For ease of reference I shall set out the whole of s 23 of the Act, which reads as follows:

A (1) Subject to the limitations contained in Art 128 of the Constitution the High Court shall have jurisdiction to try all civil proceedings where:
(a) the cause of action arose;
(b) the defendant or one of several defendants resides or has his place of business;
(c) the facts on which the proceedings are based exist or are alleged to
B have occurred; or
(d) any land the ownership of which is disputed is situated,
within the local jurisdiction of the Court and notwithstanding anything contained in this section in any case where all parties consent in writing within the local jurisdiction of the other High Court.

C As to the plaintiff's contention (i) above, it is my considered view that it matters not a jot whether s 23(1)(b) of the Act is read conjunctively or disjunctively as the phrase 'resides or, has his place of business' should not be taken to mean or to connote 'having a registered office'. If the latter position had been the intention of the legislature, it would have been so expressed. In my judgment, it is the place of business of a company which
D is of material consideration on the question of the locus of a cause of action.

In support of the plaintiff's contention, the case of *Dayasar Corp Sdn Bhd v CP Ng & Co Sdn Bhd* [1990] 1 MLJ 191 ('*Dayasar*') was cited. Upon careful reading of the grounds of judgment, I find that *Dayasar* is of no assistance to the plaintiff's cause as, therein, the finding of the learned judge 'that the respondent company is residing in Kuching' was entirely based on
E its true physical location as a matter of fact, as indeed, the witnesses and all the transactions effected between the petitioner and the respondent were in Kuching. Thus, the fact that the respondent company also had its registered office in Kuching, Sarawak, was only an incidental fact in that case; though, in my view, the registered office of a company together with other factors
F may assist in determining its residence. It is of material importance to observe that nowhere in *Dayasar* did the learned judge hold that the registered office of the respondent company was the sole or even primary determinant of whether jurisdiction is conferred under s 23(1)(b) of the Act.

As regards (ii) above, it is beyond question that the plaintiff's case is
G that the cause of action originally arose from the issuance of the LOU dated 15 April 1996 but paid out vide bank guarantee/letter of undertaking dated 14 April 2000 to CSH by the plaintiff's branch in Kuching and not the admiralty action in Johor, though it was the admiralty action that led to the original LOU. Neither is the cause of action nor the plaintiff's suit, based
H on the admiralty action.

Furthermore, it is also my view that the High Court of Malaya at Kuala Lumpur is not the forum convenience to decide on the plaintiff's cause of action even if s 23(1) of the Act confers such jurisdiction on this court. The doctrine of forum convenience calls for the matter to be heard by a court which is more accessible and appropriate in the interest of all parties and for
I the ends of justice, notwithstanding that other courts also have territorial jurisdiction pursuant to s 23(1) of the Act (see *Malacca Securities Sdn Bhd v Loke Yu* [1999] 6 MLJ 112 at p 120).

It is clear that the High Court of Sabah and Sarawak at Kuching not only has jurisdiction but is the forum convenience and the most appropriate court to determine this matter on the following grounds:

(a) The cause of action arose in Kuching, Sarawak.

(b) The plaintiff's registered office and head office is in Kuching, which incidentally is also the office that granted the bank guarantee facilities as well as issued the bank guarantees/letters of undertaking.

(c) The defendant's place of business is at all material times, and still is, in Kuching, Sarawak, notwithstanding the fact that its registered office had moved to Kuala Lumpur in 1999.

(d) All the relevant documents exhibited as exhs 'A–1' – 'A–4' of encl 7, are addressed to the plaintiff's Kuching branch and/or the defendant's place of business in Kuching, Sarawak.

(e) The material witnesses for the trial of this matter must surely reside in Kuching, Sarawak as all transactions between the parties took place in Kuching, Sarawak.

Furthermore, in my view as the defendant has filed action against the plaintiff in Kuching, it is more appropriate, to save costs and time, for the plaintiff to address their claim, if any, as a counterclaim in the defendant's Kuching action for the following reasons:

(a) The parties to the action are the same, with the exception that in the Kuching action, aside from the plaintiff, the defendants include Aw and the estate of Chung.

(b) The Kuching action had been commenced by the defendant against the plaintiff prior to the commencement of the current action by the plaintiff.

(c) The issues raised and the subject matter of the Kuching action and the proceedings herein are the same, that is, the right of the plaintiff to be indemnified pursuant to a call made by CSH on the Bank Guarantee/ Letter of Undertaking No 01136000016 dated 14 April 2000, issued pursuant to the bank guarantee facility granted by the plaintiff to Aw and Chung.

(d) The issues and matters raised herein are matters that could have been properly raised as a counterclaim in the Kuching action.

I am entirely satisfied that the SAR was correct in allowing the defendant's application to strike out the claim. In the event, I dismissed the plaintiff's appeal (vide notice of appeal dated 9 April 2002) with costs.

Plaintiff's appeal dismissed.

Reported by Lim Lee Na